

DOCUMENT RESUME

02402 - [A1592576]

[Unsolicited Insertion of Model Numbers in Bid Violated Specifications]. B-188459. June 1, 1977. 5 pp.

Decision re: J. S. Staedtler, Inc.; by Robert P. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel: Procurement Law II.
Budget Function: General Government: Other General Government (806).

Organization Concerned: General Services Administration.

Authority: Buy American Act (41 U.S.C. 10a-d). F.P.R. (FPMR 101-7), para. 1-6.101(a). F.P.R. 1-6.101(a). B-183799 (1975). B-182604 (1975). B-185681 (1976). B-178046 (1973). B-170908 (1971). B-178377 (1973). 50 Comp. Gen. 8. GSA Supplemental Provision, art. 25.

Protester inserted references to its own model numbers of fountain pens next to Government's item descriptions without explanation in bid, contrary to clear warning that such would violate specifications. GAO considered such insertion as qualifications of bid, and the bid was rejected for nonresponsiveness. Requirements of Buy American Certificate did not justify such insertion. (Author/DJM)

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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-188459

DATE: June 1, 1977

MATTER OF: J. S. Staedtler Inc.

DIGEST:

Where IFB warned that unsolicited references to model numbers would cause rejection of bid unless conformity of offered items to specific tions was clear from bid or accompanying papers, rejection of low bid with references to manufacturer's model numbers without explanation was proper. Representations required under Buy American Certificate do not justify insertion of manufacturer's model numbers elsewhere in bid.

J.S. Staedtler Inc. (Staedtler) protests the rejection of its bid submitted in response to an invitation for bids (IFB No. FP00-EZ-49020 A) issued by the General Services Administration (GSA) to procure technical fountain pens. Staedtler's bids for various items were rejected because the firm inserted references to its model numbers such as "MARS 700 045 Technical Pen (Size 1)" next to the Government's item descriptions for which prices were requested. Staedtler's bid otherwise contained no expression that its model numbers conformed to the specifications and there were no descriptions accompanying the bid. GSA rejected the bid as nonresponsive and considered such insertions as qualifying the bid and a violation of Article 25 of the GSA Supplemental Provisions. This article reads as follows:

"25. UNSOLICITED SAMPLES, DESCRIPTIVE LITERATURE, OR BRAND NAME REFERENCES

"Where procurement is effected under specifications or purchase descriptions (other than 'brand name or equal') and the Government does not specifically request bid samples, descriptive literature,

or references to brand names, models, or part numbers as an integral part of the bid, bids which are accompanied by any of the foregoing will be rejected unless it is clear from the bid or accompanying papers that the samples, descriptive literature, or references to brand names, models, or part numbers are not intended to qualify the bid and that the bidder proposes to furnish items fully in accordance with the specifications or purchase descriptions. Where offers contain unsolicited material such as samples, descriptive literature, or references to brand names, models, or part numbers, the Government will not be responsible in any way for determining whether the items which are offered meet the Government's requirements set forth in the applicable specifications or purchase descriptions."

Staedtler contends that the references to its model numbers were not intended to qualify the bid in any way and that the inserted words were a necessary cross-reference to its response to the Buy American Certificate (paragraph 7, Standard Form 33) where it identified by brand name, the end products to be produced outside the United States. Staedtler points out that Federal Procurement Regulations (FPR) § 1-6.101(a) which defines "end products" for purposes of the Buy American Act, 41 U.S.C. § 10a-d, states " * * * As to a given contract, the end products are the items to be delivered to the Government." Staedtler concludes that "a listing of the items to be delivered to the government which is expressed in terms of brand names, models and part numbers is directly responsive" to the language quoted above, that it logically follows that listing a brand name in response to the requirements of the Buy American Act cannot fairly be construed as "unsolicited" reference for purposes of Article 25 and that, by virtue of the Buy American Act, Article 25 has no application to Staedtler's bid. In addition to inserting the brand name in its Buy American Certificate, the protester contends its references to various model numbers next to the Government's descriptions in the pricing schedule was intended to cross-reference its Buy American Certificate.

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We are not persuaded that the references to the bidder's model numbers were not intended to qualify the bid. The Buy American Certificate does not require or solicit identification by model numbers of excluded end products and, in any event, it was not necessary to cross-reference the certificate by referencing the manufacturer's model numbers elsewhere. Identification for purposes of the Buy American certification can be accomplished in a number of ways which are consistent with the requirements of Article 25. For example, in this case, the word "all" would have been appropriate because each item bid was foreign. The reference to the MARS brand name in the Buy American Certificate merely indicates that the end product will be foreign made. The certificate does not address the issue of whether the end item conforms to specification. Moreover, assuming arguendo, that a bidder could properly identify excluded end products in its Buy American Certificate by referring to its own model numbers, we see no reasonable basis upon which it could be contended that the express warning in Article 25 concerning brand name references would become inapplicable to such references elsewhere, such as in the price schedule.

This Office has frequently held that the unsolicited listing of a model number in a bid creates an initial ambiguity. Abbott Laboratories, B-183799, September 23, 1975, 75-2 CPD 171; Lift Power, Inc., B-182604, January 10, 1975, 75-1 CPD 13; 50 Comp. Gen. 8 (1970). In such a case, it is not clear whether the bidder is offering to supply the required item in complete conformance with the specifications or is merely offering a similar item which may or may not conform to the specifications. Unless it is shown that the model numbers refer to parts which conform to the specifications, the bid must be rejected as an ambiguous bid.

The question of responsiveness concerns whether a bidder has unequivocally offered to provide the requested item in total conformance with the terms and specifications of the IFB. Sentinel Electronics, Inc., B-185681, June 24, 1976, 76-1 CPD 405. This determination must be made from the bid document as of the time bid are received. A limited exception to this rule has evolved in that the Government may refer to published commercial literature if it is available to the Government prior to bid opening and indicates conformity of the item offered to the specifications. B-178046, July 25, 1973.

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In this case, however, by the terms of Article 25 of GSA Form 1424, GSA apprised bidders of the consequences of including in their bids unsolicited information without further clarification and warned that the Government would not be responsible in any way for determining whether the offered items conformed to the specifications.

Staedtler contends that decisions of this Office have held that Article 25 is inoperable where, prior to bid opening, published commercial literature was publicly available or the contracting officer had material available from which conformity of the offered part to the specification could be ascertained. However, in three of the decisions (B-170908, March 5, 1971; B-178046, July 25, 1973; Sentinel Electronics Inc., supra.) there is no discussion of Article 25. While the record of B-178046 indicates that Article 25 was included in the solicitation, the protest was denied on the grounds that the contracting officer did not have material descriptive of the model numbers listed and that, in any event, such material would not have conclusively shown conformance to the specification without assurance that the protester's model had not been modified since publication of the material. We believe that this case does not stand for the proposition that the contracting officer, in the light of Article 25, must locate and examine any published material describing the protester's model numbers. Similarly, the fourth case cited by Staedtler (B-178377, July 25, 1973) which discussed Article 25, supports the view that Staedtler's bid was properly rejected because we denied the protest concerning the rejection of the bid even though the agency did so without making any attempt to determine from other available evidence whether the items referenced in the bid conformed to the Government's purchase description.

In our opinion Article 25 clearly reflects that GSA intended that the burden of determining whether an item conforms to the specification rests upon the bidder and not upon GSA. Under these conditions, we believe that GSA was not required to locate and examine for purpose of determining compliance with the specification the published material which Staedtler asserts had been distributed during 1975 and 1976 to GSA offices throughout the country including the office conducting this procurement.

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In any event, concerning the material available for review in this case, the protester contends only that it shows compliance with the general description of the item in GSA's supply catalog. It does not contend that complete compliance with the detailed specification referenced in the solicitation could be determined from the material available to the contracting officer. We therefore conclude that the protester's bid may be rejected as ambiguous.

Accordingly, this protest is denied.

R. F. K...
Deputy Comptroller General
of the United States